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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-362

ROGERS C. B. MORTON, ET AL., APPELLANTS

v.

C. R. MANCARI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. A) is reported at 359 F. Supp. 585 (D. N.M.).

JURISDICTION

The judgment of the district court was entered on June 1, 1973. A notice of appeal to this Court was filed on June 29, 1973. The Court noted probable jurisdiction on January 14, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Act of 1972 repealed, by implication, the Acts of Congress giving Indians preference in employment in the Bureau of Indian Affairs of the Department of the Interior.

2. Whether the Acts of Congress giving Indians preference in employment in the Bureau of Indian Affairs violate the Due Process Clause of the Fifth Amendment.

STATUTES INVOLVED

The Indian Reorganization Act of 1934, Section 12, 48 Stat. 986, 25 U.S.C. 472, provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.[1]

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[1] Other Indian preference statutes, presumably invalidated by the judgment below, are:

Act of June 30, 1834, Section 9, 4 Stat. 737, 25 U.S.C. 45, provides:

> In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if

Section 717 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, Section 11, 86 Stat. 111, 42 U.S.C. (Supp. II) 2000e-16, provides in relevant part as follows:

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such can be found, who are properly qualified for the execution of the duties.

Act of July 4, 1884, Section 6, 23 Stat. 97, 25 U.S.C. 46, provides in relevant part:

> Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

Act of August 15, 1894, Section 10, 28 Stat. 313, 25 U.S.C. 44, provides:

> In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

Act of June 7, 1897, Section 1, 30 Stat. 83, 25 U.S.C. 274, provides:

> The Commissioner of Indian Affairs shall employ Indian girls as assistant matrons and Indian boys as farmers and industrial teachers in all Indian schools when it is practicable to do so.

Act of June 25, 1910, Section 23, 36 Stat. 861, 25 U.S.C. 47, provides:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

These statutes have, for practical purposes, been replaced, with respect to employment, by the broader provisions of 25 U.S.C. 472.

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

The appellees are non-Indian employees of the Bureau of Indian Affairs ("BIA") who complain that they were denied promotion or opportunity for further training because Indians were accorded preference over them. They brought this action on their own behalf and for the class of similarly-situated non-Indians to enjoin the Secretary of the Interior and certain named officials of the BIA from enforcing the Indian preference laws (App. 22-25).

The appellees claimed that the preference laws deprive non-Indian employees of the BIA of property without due process of law in violation of the Fifth Amendment; that they have in effect been repealed by the Equal Employment Opportunity Act of 1972; and that, in any event, they are being interpreted too broadly by the Secretary in that the laws were intended to apply only to initial hiring, not promotions or reassignments for training (App. 23-24). The three-judge district court, convened pursuant to 28 U.S.C. 2282, held that the Indian preference laws had been tacitly repealed by the Equal Employment Act of 1972. While stating that it "could well" do so, the court expressly did not hold the laws unconstitutional (J.S. App. 23).[2] The court's judgment "permanently enjoin[s] [the appellants] from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian * * *" (J.S. App. 24). On August 16, 1973, Mr. Justice Marshall stayed the judgment of the district court, pending this Court's disposition of this appeal (J.S. App. 27).

SUMMARY OF ARGUMENT

The Equal Employment Opportunity Act of 1972 did not, either specifically or by implication, repeal the long-standing statutes giving a preference to In-

[2] In light of its holding that the preference laws had been repealed, the court did not comment on the scope of their enforcement.

dians (of federally recognized tribes) in the federal Indian service which serves those tribes.

The Indian preference statutes, which are based on participation by the governed in the governing agency, rather than race, are an important part of federal Indian policy. In this century, they have been strengthened by Congress and enforced more vigorously by the Executive. There is no conflict between generally forbidding racial discrimination in employment, and a preference for Indians in the Indian service.

The 1972 Equal Employment Opportunity Act was an amendment to the 1964 Civil Rights Act which expressly preserved the validity of giving an employment preference to Indians in the service of their people. The purpose of the 1972 Act was to provide new means of enforcing existing rights, and the Act was not intended to make any substantive change in those rights. To hold that the 1972 Act repealed the longstanding Indian preference laws is to give it a meaning not intended by Congress.

Finally, the Indian preference laws are constitutional. They apply only to Indians of tribes whose affairs are administered by the Bureau of Indian Affairs. They therefore are not racial legislation, but statutes which foster Indian self-government and self-determination. They also assure that job opportunities on Indian reservations are made available to Indians. They are well within the congressional authority to legislate for the Indian tribes as an historically distinct, constitutionally-recognized people, to

whom the federal government has assumed special obligations in the exercise of its commerce, treaty and war powers.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING A REPEAL BY IMPLICATION OF A SPECIAL, LONG-STANDING CONGRESSIONAL POLICY IN THE ABSENCE OF A SHOWING OF LEGISLATIVE INTENT TO REVERSE THAT POLICY

A. The affording of preferences to tribal Indians in employment in the Indian service is an important congressional policy in support of the federal government's trust responsibilities to the Indian tribes.

1. *During the century preceding the enactment of the 1934 Indian Reorganization Act, federal law consistently provided for certain preferences for the employment of Indians in the provision of Indian service.*

The early dealings between the United States and the Indian tribes were through treaties, many of which specifically promised that the government would undertake certain services on the reservations.[3] The treaties occasionally provided a preference to Indians in doing some of the required work.[4] When

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[3] See, *e.g.*, Treaty with the Choctaws of October 18, 1820, 7 Stat. 210, Arts. 6 and 7; Treaty with the Chippewas of August 5, 1826, 7 Stat. 290, Art. 6; Treaty with the Navahos of June 1, 1869, 15 Stat. 667, Art. VI.

[4] See United States Department of the Interior, *Federal Indian Law*, p. 532 *et seq.* (1958). See also Treaty of March 11, 1863, with the Chippewas, 12 Stat. 1249, 1251, Art. XI, providing "[w]henever the services of laborers are required upon the reservation, preference shall be given to full or mixed bloods, if they shall be found competent to perform them".

the Bureau of Indian Affairs was reorganized in 1834, its organic Act[5] provided for the hiring of interpreters, blacksmiths, farmers, mechanics and teachers for the various Tribes as required by treaty. It also specified, in a provision now codified as 25 U.S.C. 45:

> In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.[6]

Thus from the early history of the Bureau of Indian Affairs a preference for the employment of Indians was considered part of its broad purpose to provide:

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[5] Act of June 30, 1834, 4 Stat. 735. The succession of agencies used in the government administration of Indian affairs prior to 1834 is discussed in *Federal Indian Law*, *supra*, at 215-218. Under the 1834 Act the Bureau (referred to in the Act as the Department of Indian Affairs) remained in the War Department. In 1849 it was transferred to the Department of the Interior. Act of March 3, 1849, 9 Stat. 395. See *Federal Indian Law*, *supra*, at 218-219. The Bureau has subsequently remained in the Department of the Interior except that the Indian Health Service was transferred to the Department of Health, Education, and Welfare in 1954, Act of Aug. 5, 1954, 68 Stat. 674, 42 U.S.C. 2001. In 1929 the then Secretary of the Interior required that the Bureau henceforth be referred to as "the Indian Service" apparently because "the word 'bureau' was in bad repute" (*Federal Indian Law*, *supra*, at 221).

[6] Act of June 30, 1834, Section 9, 4 Stat. 737.

> * * * a system of laws and of administration * * * that shall, with a due regard to the rights of our own citizens, meet the just expectations of the country in the fulfilment of its proper and assumed obligations to the Indian tribes. [H. Rep. No. 474, 23rd Cong., 1st Sess. 1 (1834).]

The subsequent Report of the Secretary of War mentioned that the preference requirement for native teachers had received attention and that Indian agents were instructed to explain the preference to the Tribes (1 Sen. Doc. No. 1 (1834), 237, 256).

After some fifty years, congressional concern for the Indian employment preference was reaffirmed in the Indian Department Appropriations Acts of May 17, 1882, 22 Stat. 88, and of July 4, 1884, 23 Stat. 97, both now codified in 25 U.S.C. 46 as follows:

> Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

The Appropriations Act of August 15, 1894, Section 10, 28 Stat. 313, codified as 25 U.S.C. 44, reiterated the Indian preference for all employment in the Indian Bureau and expressed apparent congressional concern that the mandatory preference was not being enforced:

> In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service.

> And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

While there was little congressional debate on the Indian preference provisions themselves during the nineteenth century,[7] a number of themes appear in general debate and committee reports concerning Indian appropriations and other Indian affairs which suggest the apparent legislative purposes in enacting the preference statutes.[8]

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[7] The preference clause in the 1882 and 1884 appropriations Acts was added by the Senate Committee on Appropriations to H.R. 4185, 47th Cong., 1st Sess. (1882). This amendment was accepted without debate by Congress. See 13 Cong. Rec. 2372, 2653 (1882). The following year the appropriation bill was passed without mention of Indian preference. However, in 1884 the preference reappeared as part of Sec. 6 of H.R. 6092, 48th Cong., 1st Sess. (1884), and was passed without comment. That bill was amended on the floor of the House (15 Cong. Rec. 2573 (1884)) by adding to an appropriation for transportation of goods for the Sioux Tribes, the clause: "* * * and in this service Indians shall be employed wherever practicable." This amendment was approved (23 Stat. 87) and reappeared in the appropriations Act of the next session (23 Stat. 375).

Mention of an Indian preference was omitted from the annual Indian Department appropriation Acts until the passage of the Act of August 15, 1894, 28 Stat. 313, codified as 25 U.S.C. 44. This provision was introduced as part of H.R. 6913, 53rd Cong., 2d Sess. (1894), the Indian appropriation bill. It received no comment in the House Report accompanying the bill (H. Rep. No. 802, 53rd Cong., 2d Sess. (1894)), and was mentioned only once in debate on the House floor in conjunction with the need for interpreters (26 Cong. Rec. 6076, June 9, 1894).

[8] These themes reappear, with a shift in emphasis toward self-determination, in the twentieth century in discussions

One of these themes was the duty of Congress to insure the education of Indians in the skills of the majority culture. The legislators' prime interest was that Indians be trained to support themselves in "civilized" occupations, and to acquire the skills of self-government in the white man's world.[9] To this end practical education was eulogized, and the educational value of government employment was stressed.[10]

Indian poverty is a related theme. As the Indian's traditional economic system disintegrated with the loss of vast areas of his land, the poverty of the unemployed Indian became a national scandal. Government service in their own behalf was proposed as one approach to ameliorating Indian unemployment.[11] There was also repeated expression of congressional concern over the plight of Indian youths who were educated at eastern schools, and returned to the reservations only to find their training useless and all skilled jobs filled by non-Indians.[12]

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surrounding the 1934 Indian Reorganization Act, which contained the broadest of the Indian preference statutes. See pp. 13-20, *infra*.

[9] See 13 Cong. Rec. 2416-2418, March 30, 1882 (Sen. Hoar); 42 Cong. Rec. 1699, Feb. 6, 1908 (Rep. Smith).

[10] See Report to the Secretary of War, 11 Congressional Debates, Appendix, 23d Cong., 2d Sess. (1834), p. 41 *et seq*; 13 Cong. Rec. 2374, March 29, 1882 (Rep. Beck).

[11] 13 Cong. Rec. 2459, March 31, 1882 (Sen. Allison); 42 Cong. Rec. 1695, February 6, 1908 (Rep. Sherman); 45 Cong. Rec. 2095, February 18, 1910 (Rep. Stephens).

[12] See, *e.g.*, 13 Cong. Rec. 2457, March 31, 1882 (Sen. Teller); 13 Cong. Rec. 2458, March 31, 1882 (Sen. Hoar); 26

The tension between the ideals of Indian self-government (or integration into the dominant society) and the actuality of pervasive subjection of tribal Indians to the powers of an often insensitive Indian service also runs through congressional debates, culminating in the Indian Reorganization Act of 1934. See, *e.g.*, 26 Cong. Rec. 6249-6251, June 13, 1894. One way of decreasing this tension and improving relations between the government and the tribes was thought to be the employment of Indians in the Indian Service because they would be best qualified to appreciate Indian needs, most likely to be sympathetic to Indian problems, and least likely to further the humiliation which comes from dependency on strangers for the necessities of life.[12]

Finally, there was congressional concern during this period about the role of non-Indian employees in the Indian Service. The House Report on the 1834 Act, H. Rep. No. 474, 23rd Cong., 1st Sess. 78, 98 (1834), contains a letter from Indian Commissioners who worked on resettlement of tribes beyond the Mississippi River, warning of the evil effects of whites, including governmentally licensed trading agents, living among the Indians. And concern was repeatedly expressed in Congress about the excessive hiring

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Cong. Rec. 6077, June 9, 1894 (Rep. Cannon); 26 Cong. Rec. 6076, June 9, 1894 (Rep. Holman).

[12] See, *e.g.*, 42 Cong. Rec. 1705, February 6, 1908 (Rep. Olmsted).

of non-Indian agents, inspectors, and commissioners who either performed no service for Indians or exploited them.[14]

None of these themes and concerns can be shown to have directly resulted in the passage of any of the Indian preference Acts. Yet, together, they suggest that the Acts reflect a pervasive congressional concern that some form of preference for Indian employment in the performance of services for Indians and the management of Indian affairs was necessary to advance the welfare of the Indian tribes and to eliminate serious problems that had developed in the administration of the Indian Service.

2. ***The Indian Preference Section of the 1934 Indian Reorganization Act revitalized and strengthened the congressional policy that, to the extent practicable, Indian services should be performed by Indians and Indian affairs should be managed by Indians.***

Cohen describes the Indian Reorganization Act of 1934 as "probably equaled in scope and significance only by the legislation of June 30, 1834 [which reorganized the Department of Indian Affairs] and the General Allotment Act of February 8, 1887 * * *"[15]

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[14] See 15 Cong. Rec. 2522-2532, 2559-2565, Apr. 2 and 3 1884, especially remarks of Rep. Throckmorton at 2523; 26 Cong. Rec. 6078-6080, June 9, 1894, especially remarks of Rep. Holman at 6078.

[15] Department of the Interior, *Handbook of Federal Indian Law*, p. 84 (1942); see also *Federal Indian Law, supra*, p. 128.

It is Section 12 of the Indian Reorganization Act that the three-judge district court held to have been tacitly repealed. The section provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

This provision is an integral part of the Act's three-pronged design to end the loss of Indian land by eliminating the allotment policy; to end the destruction of Indian self-government and self-respect by fostering, rather than discouraging, tribal governments; and to end abuses in, and the demeaning effect of, federal supervision of Indian affairs by giving Indians dominance in the regulation of their own affairs (see pp. 16-21 *infra*).

The Indian Reorganization Act began as an administration bill in the House of Representatives, H.R. 7902, 73rd Cong., 2d Sess. (1934), designed to accomplish a "new deal" for Indians. 78 Cong. Rec. 7807. The original bill proposed to allow Reservation Indians to set up federally chartered communities which would be run by their residents and would progressively replace the Bureau of Indian Affairs as

the government (including source of government services and jobs) on the reservations. The governments of the Indian communities would be staffed by Indians, under standards set by the Secretary of the Interior.[16] The role of the BIA would be greatly reduced.

One of the reasons for the institution of chartered communities was that the enactment and administration of civil service laws had greatly diminished Indian participation in the BIA, which governed Indian communities:

> The bill admits qualified Indians to the position[s] in their own service.
>
> Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total of positions, was greater than it is today.
>
> The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs.[17]

In support of the bill, the Committee heard, among others, a representative of the Blackfeet Tribe who testified that the tribal Indians—

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[16] Hearings before the House Committee on Indian Affairs, on Readjustment of Indian Affairs, H.R. 7902, 73rd Cong., 2d Sess. (1934) (hereinafter cited as "House Hearings"), pp. 1-7.

[17] Memorandum of Explanation to the Committees on Indian Affairs by John Collier, Commissioner of Indian Affairs, House Hearings, p. 19.

> * * * can see their boys and girls going to these schools there on the reservation and they are being turned out of those schools with nothing to do, no place to go; and yet they are capable of filling positions there, and they are not given those positions because you have this Civil Service law which prevents them from qualifying for those positions. [House Hearings, 248 (May 1, 1934).]

By the last day of the House hearings it had become apparent that the committee would not accept the federally chartered community portion of the bill and the almost total elimination of the BIA.[18] Opponents of the bill then questioned Commissioner Collier on what he considered to be the basic elements of the bill; he emphasized the importance of employing Indians in the Indian Service:

> Then we feel very strongly that some readjustment of the civil service must be arranged for so that Indians will not be excluded if they are fit. They are discriminated against now under the present civil service, and it cannot be helped. * * * It will require some law. [House Hearings, 491 (May 8, 1934).]

In rewriting the bill the committee was faithful to the purpose of the bill but changed the method of accomplishing that purpose. Rather than setting up federal communities and virtually eliminating the role of the BIA, it strengthened tribal government while retaining the active role of the BIA in administration and in rendering municipal service—but

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[18] House Hearings, 492-497 (May 8, 1934).

with provision for an Indian preference in the BIA, including an express exception to the civil service laws. The House Committee on Indian Affairs Report on H.R. 7902 explained the preference provision as follows:

> It liberalizes the present rigid civil-service requirements so as to admit qualified Indians to the Indian Service, which is largely paid for by the Indians themselves. [H. Rep. No. 1804, 73rd Cong., 2d Sess., 6 (1934).]

In the House, the Indian preference section was fully debated. The bill's sponsor, Representative Howard, defended the section as an essential part of the new program to return some measure of self-government and economic independence to the Indians, analogizing the Indian Service to municipal services normally provided by local governments:

> The Indians have not only been thus deprived of civil rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete under existing law, on equal terms with multitudes of white applicants. * * * The various services on the

> Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so. [78 Cong. Rec. 11729 (1934).][19]

Congress recognized that the Indian preference policy could well result in making the Indian Service largely an Indian-staffed organization. One of the bill's opponents read the following remarks by Commissioner Collier on the subject into the record:

> Mr. Collier. * * * However, we must not blind ourselves to the fact that the effect of this bill if worked out would unquestionably be to replace white employees by Indian employees. I do not know how fast, but ultimately it ought to go very far indeed. [78 Cong. Rec. 11737 (June 15, 1934) (Rep. Carter).]

Representative Howard, on the other hand, referred enthusiastically to the prospect of a predominantly Indian-staffed Indian Service:

> I have already spoken of the difficulty which Indians experience in meeting the civil-service requirements for entering the Indian Service. It

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[19] For a similar statement in floor debate in the House, but by a Representative who otherwise opposed the bill, see 78 Cong. Rec. 9270 (May 22, 1934) (Rep. Hastings).

should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians. This does not mean a radical transformation overnight or the ousting of present white employees. It does mean a preference right to qualified Indians for appointments to future vacancies in the local Indian field service and an opportunity to rise to the higher administrative and technical posts. [78 Cong. Rec. 11731 (June 15, 1934).]**

** The Senate Hearings and debates are to the same effect. In the Senate Hearings on the revised House bill (redesignated S. 3645), the provision on Indian Civil Service was attacked by Luther Seward, President of the National Federation of Federal Employees. Hearings before the Senate Committee on Indian Affairs, on S. 2755 and S. 3645, 73d Cong., 2d Sess. (1934) (hereafter cited as "Senate Hearings"), p. 256. It was defended by the Committee Chairman, Senator Wheeler, on several grounds:

> You are discriminating at the present time. We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. What this policy of the Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service

President Roosevelt, in a letter supporting the bill sent to Senator Wheeler and Representative Howard, stated:

> Indians throughout the country have been stirred to a new hope. They say they stand at the end of the old trail. Certainly, the figures of impoverishment and disease point to their impending extinction, as a race, unless basic changes in their conditions of life are effected.
>
> I do not think such changes can be devised and carried out without the active cooperation of the Indians themselves.
>
> The Wheeler-Howard Bill offers the basis for such cooperation. It allows the Indian people to take an active and responsible part in the solution of their own problems. [H. Rep. No. 1804, *supra*, at 8.]

In sum, the Indian preference provision was a thoroughly analyzed, thoroughly debated integral step in the accomplishment of the goal of self-determination for Indians and the ending of well documented discrimination against them caused by, among other things, the application of ordinary civil service rules to the Indian Service.

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is concerned because of the fact that it has discriminated against Indians. [Senate Hearings, *supra*, 256.]

See also Senate Hearings at 257-259, especially Senator Norbeck's statement at p. 259: "I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation has been filled up with white people who live off the Indians." For floor debate, see, *e.g.*, 78 Cong. Rec. 11123 (June 12, 1934) (Sen. Wheeler).

3. ***In light of their limited application, the Indian preference laws serve a non-discriminatory purpose and are not an obstacle to the elimination of racial discrimination in employment.***

a. The Indian preference laws are not applied by the BIA to all persons of Indian racial origin. The preference is limited to persons of one-quarter or more Indian blood of federally recognized tribes (App. 194), that is, tribes whose affairs are subject to BIA supervision. The preference thus is not in truth a racial preference, but a preference for those persons whose affairs are governed by the BIA to participate in its activities (see *infra*, pp. 30-31). A full blooded Indian who is not of a federally recognized tribe, *e.g.*, a member of a terminated tribe or of a Canadian or Mexican tribe, has no preference.

The preference laws have had an important effect in fostering the objective of self-government through participation in the Indian Service. In 1934, there were approximately 2,100 Indians employed by BIA out of about 6,500 employees, or about 34 per cent (App. 190). By 1972, under the operation of the 1934 Act, the number had grown to 57 percent of a total employment of approximately 16,500 (App. 191). However, until recently, the government applied the preference only to initial hiring in the Indian Service, and not to promotions (App. 69, 181-182); Indian employees therefore tend to occupy the lower paying, less policy-oriented jobs (App. 40). With the present, more vigorous application of these laws (which apparently precipitated this suit, see *e.g.*, App. 137) considerable progress can be made in

giving Indians the opportunity to make the decisions as well as to do the work needed for their own betterment as intended by the 1934 Act (see, *e.g.*, App. 199).

b. As the government has become increasingly involved in securing the civil rights of all citizens, the Indian preference laws have been regarded by both the Executive and Congress as consistent with that aim, not as detrimental to it. Accordingly, the Civil Service rules since the passage of the Indian Reorganization Act have shown positions in the Bureau of Indian Affairs as excepted service. See Ex. Order 7423, July 26, 1936 1 Fed. Reg. 885-886. With the transfer of BIA health services to the Department of Health, Education, and Welfare the rules now except:

> All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood. [5 C.F.R. § 213.3112(a)(7) (1971).]
>
> *Public Health Service* * * * (8) Positions directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood. [5 C.F.R. § 213.3116(b) (1971).][21]

That the Executive has seen no conflict between the government's general obligation to afford equal em-

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[21] The most recent republication of Schedule A appeared on December 13, 1973, in 38 Fed. Reg. 34294.

ployment opportunities and the preference for Indians of regulated tribes in the Indian service, is particularly apparent in Ex. Order 10577, issued by President Eisenhower on November 22, 1954, 19 Fed. Reg. 7521. In Section 301 of that order the President revoked all previous Executive Orders bearing on the Civil Service Rules except Schedules A, B, and C which contained the exception for the Indian Service. In Section 4.2 of the same order President Eisenhower expressly forbade discrimination against any

> * * * applicant for a position in the competitive service because of his race, political affiliation or religious beliefs, except as may be authorized or required by law.

As to congressional approval of the preference for Indians in the Indian Service, we pretermit for the moment a discussion of the Equal Employment Opportunity Act of 1972, which we discuss *infra*, pp. 24-29, and which in our view supports the preference. We note, however, that only three months after the passage of that Act, Congress amended the bi-lingual education provisions of the Elementary and Secondary Education Act which provides funding for the training of teachers for Indian children. Pub. L. No. 92-318, 86 Stat. 335, 20 U.S.C. (Supp. II) 887c(a) and (d), 1119a, and 1221g(a). These amendments *require* that preference be given in the use of these funds for the training of Indians as teachers, and set up a National Advisory Council on Indian Education whose members must, by law, be Indians.

B. The Equal Employment Opportunity Act of 1972 did not expressly or by implication repeal the Indian preference statutes.

The court below held that the Equal Employment Opportunity Act of 1972, by implication, repealed the statutes preferring Indians in the Indian Service. This conclusion attributes to Congress an intention that is not manifested in the terms of the Act or its legislative history. Indeed, the contrary intention is suggested by the Act's legislative background.

The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 111, 42 U.S.C. (Supp. II) 2000e-16, is an amendment to Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.* The 1964 Act, which prohibits discrimination in private employment on the basis of race, color, religion, sex, or national origin, preserved a preference for Indians in employment by Indian tribes or in industries located on or near reservations. Section 701(b), 42 U.S.C. 2000e(b), specifically excludes Indian tribes from the definition of "employer", thereby exempting them from the requirements of the Act. Section 703 (i), 42 U.S.C. Section 2000e-2(i), permits businesses or enterprises located on or near Indian reservations to give preferential treatment in hiring to Indians who live on or near these reservations.

Senator Humphrey, the sponsor of the latter provision, pointed out that it would permit private employers to use a limited version of the Indian preference which had long been a policy in the public sector:

> This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians. [110 Cong. Rec. 12723 (June 4, 1964).][22]

Congress was thus reasoning by analogy to the federal Indian preference laws in exempting from the 1964 Act's general prohibition of discrimination a preference for the employment of Indians by Indian tribes or by employers on or near Indian reservations. Especially in light of the fact that the 1964 Act also contained a provision stating a general policy of nondiscrimination in federal employment,[23] it is apparent that Congress did not intend the employment policies adopted in the 1964 Act (and carried forward in the 1972 amendment) to affect the special situation of Indian employment in the Indian Service.

b. The Equal Employment Opportunity Act of 1972 does not by its terms repeal the Indian preference laws. The provision of the 1972 Act prohibiting discrimination based on race, which the court below

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[22] Similarly, Senator Mundt stated that these exemptions for Indians would allow them "to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13702 (June 13, 1964).

[23] A proviso to Section 701(b) (42 U.S.C. (1964 ed.) 2000e (b)) specifically provided:

> it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin * * *

and directed the President to use his existing authority to effectuate this policy. This proviso was repealed, Pub. L. 89-554, 80 Stat. 523, 662 (1966), and reenacted as 5 U.S.C. 7151.

interpreted as repealing the Indian preferences, was not regarded by Congress as creating new rights or changing existing rights. It was intended, instead, as merely a restatement of existing substantive rights in an Act designed to provide new procedures for enforcing those existing rights. This is made quite clear by the House Report:

> The prohibition against discrimination by the Federal Government, based upon the due process clause of the fifth amendment to the Constitution, was judicially recognized long before the enactment of the Civil Rights Act of 1964. And Congress itself has specifically provided that it is "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin . . ." (5 U.S.C. 7151 (Supp. II * * * 1965, 1966)) * * *
>
> A critical defect of the Federal equal employment program has been the failure of the complaint process.[24]

It would be anomalous to conclude that Congress in 1972 repealed the Indian preference laws relating to employment in the BIA (the agency which administers tribal property and is primarily responsible for Indian welfare) while continuing to permit private employers to give such a preference. It is apparent that if Congress had intended to repeal the

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[24] H. Rep. No. 92-238, 92d Cong., 1st Sess. on H.R. 1746 (1971). See also the remarks of Senator Cranston to the same effect in floor debate at 118 Cong. Rec. S2279 (daily ed., Feb. 22, 1972).

Indian preference statutes in 1972, there would have been some reconsideration of the preference exceptions contained in Sections 701(b) and Section 703(i) of the 1964 Act, which was being amended.

But more to the point, there would have been some mention of the Indian preference statutes themselves, and there is none, in either the legislative hisory of the 1972 Act or its terms.

Repeals by implication are not favored and are to be avoided in the course of statutory construction unless the statutes are irreconcilable,[25] which is certainly not the case here (as the exceptions in the 1964 Act demonstrate). And, specifically, a later general statute, not expressly repealing a prior special statute, will ordinarily not affect the special statute, which remains as an exception.[26]

The latter principle of statutory construction is especially applicable here because the Indian preference provision of the 1934 Act is expressly stated to be an exception to the civil service laws, and Section 717 of the 1972 Act, which the court below relied on as repealing the Indian preference law, is essentially

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[25] See *Posadas* v. *National City Bank*, 296 U.S. 497, 503; *United States* v. *Jackson*, 302 U.S. 628, 631; *United States* v. *Borden Company*, 308 U.S. 188, 198; *Jones* v. *Mayer Co.*, 392 U.S. 409, 416-417.

[26] *Rodgers* v. *United States*, 185 U.S. 83, 87-89; *Ex Parte Crow Dog*, 109 U.S. 556, 571. See also *Bulova Watch Company* v. *United States*, 365 U.S. 753, 758 (general interest provision for overpayment to IRS did not repeal section in IRS Code concerning interest on one type of overpayment); *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107; *D. Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208.

a civil service law. The bulk of Section 717 grants specific powers to the Civil Service Commission for enforcing rights against discrimination (42 U.S.C. (Supp. II) 2000e-16(b)-(d)). The creation of these new civil service procedures, where applicable, is in no way inconsistent with the continued vitality of 25 U.S.C. 472, which specifically provides for Indian preference in the Indian Service, "without regard to civil-service laws." [27]

Moreover, the absence of any mention of the Indian preference is also crucial, because, as we have shown (*supra*, p. 21) and show within (*infra*, pp. 30-31), the Indian preference statutes are based on a federal guardianship over *some* Indians tribes, not race or national origin, and the 1972 Act by its terms is directed against discrimination based on race or national origin. The situation which concerned Congress and which led to the passage of Section 717 of the 1972 Act was the *lack* of miniority representation in federal employment. Statistics were presented in support of Section 717 which showed that certain minority groups were almost completely absent from the federal employment rolls in all but the lowest levels (118 Cong. Rec. S2280, S2291-S2294 (daily ed., Feb. 22, 1972)). Viewed against this background, it is entirely unrealistic to assume that Congress, in adopting legislation expressly designed to increase

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[27] As noted earlier, see pp. 16-19, *supra*, the legislative history of the 1934 Act contains abundant expressions of congressional recognition of a need to exempt Indian BIA employees from civil service laws and requirements.

minority representation in government, intended to repeal—without a word—a carefully considered and historical preference designed to enlarge (for non-racial reasons of self-determination) the numbers of Indians in the federal Indian service.

In sum, the lack of any specific language of repeal in the 1972 Act, the inapplicability of the language of the Act, the Act's legislative history, and settled canons of statutory construction all make it clear that Congress did not intend to repeal the Indian preference statutes and did not do so. Moreover, any doubts as to the proper construction or integration of the two statutes should be resolved in favor of Indian interests. *United States* v. *Celestine*, 215 U.S. 278, 290; *Choate* v. *Trapp*, 224 U.S. 665, 675; *Squire* v. *Capoeman*, 351 U.S. 1, 7.

II. THE INDIAN PREFERENCE STATUTES ARE CONSTITUTIONALLY VALID

Appellees argue that in giving a preference to Indians in the Indian service the government deprives non-Indians of property without due process of law in violation of the equal protection concept implicit in the due process clause of the Fifth Amendment (Motion to Dismiss 6-8). Similarly the district court suggests (J.S. App. A. 23) that its conclusion that the Indian preference statutes were repealed by implication by the Civil Rights Act of 1972 was occasioned, in part, by its doubt as to the constitutionality of those statutes. In our view, the factual and legal

basis for the preference statutes demonstrate their constitutional validity.

1. The Indian preference statutes are not based on a racial classification and do not discriminate against non-Indians on any illegitimate ground. The BIA is a federal agency whose sole function is the performance of the government's trust responsibility toward the Indian tribes. See 25 U.S.C. 2. See also *Federal Indian Law*, *supra*, 218; Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1819 (1968). The BIA manages and is responsible for all Indian trust land and most activities of the United States government related to federally recognized Indian tribes. The BIA does not exercise responsibility for tribes that have never been under federal supervision (such as some eastern tribes) or tribes whose federal relationship has been terminated by Congress (such as the Klamath Tribe of Oregon). Nor does the BIA have responsibility for persons who racially are Indians but, because they immigrated from Latin America or Canada, are not members of any tribe located in the United States (see App. 194-196, 200-201).

The Indian preference as applied by the BIA has the same limitations. The preference is given only to persons of one fourth or more Indian blood of a tribe under federal supervision.[28] The preference statutes

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[28] This is a somewhat more restrictive definition than that found in the 1934 Indian Reorganization Act, 25 U.S.C. 479.

are thus, as applied by the Bureau of Indian Affairs, a preference for the governed to participate in the governing body, not a racial preference.

2. Moreover, the Indian preference laws are a proper exercise of the long recognized power of Congress to make separate laws for the protection of tribal Indians, including the granting of benefits to Indian tribes and their members that are not available to the populace at large. See, *e.g.*, *Morton* v. *Ruiz*, No. 72-1052, decided February 20, 1974. Far from offending constitutional principles, that doctrine has its roots in the Commerce Clause of the Constitution (Art. I, Sec. 8, Cl. 3), which grants Congress the power "[t]o regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes," thus singling out Indian tribes as a proper subject for separate legislation. The power of the President, with the advice and consent of the Senate, to make treaties (Art. II, Section 2, Clause 2) is another source of federal constitutional authority for special Indian legislation, much of which began with treaty provisions. See *Worcester* v. *Georgia*, 6 Pet. 515, 559.

Both this Court and Congress have recognized that in depriving the Indian tribes of most of their land and their traditional ways of supporting themselves, through the exercise of its war and treaty powers, the federal government assumed special duties toward them—duties that have been described as resembling the duties of a guardian to a

ward. *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *United States* v. *Kagama*, 118 U.S. 375, 383-384; *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715-719; see also *Morton* v. *Ruiz*, *supra*.[29]

The guardianship principle and the powers concomitant to it (and their constitutional basis as necessary and proper to the exercise of the war and treaty powers) were set forth by the Court in *Board of Commissioners* v. *Seber*, *supra*, 318 U.S. at 715, upholding against constitutional attack a federal tax immunity granted Indians on land purchased with trust funds:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, *and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic* [emphasis supplied].

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[29] As to Congress' recognition of these duties, see, *e.g.*, the Snyder Act, 42 Stat. 208, 25 U.S.C. 13, discussed with various appropriation Acts, in *Morton* v. *Ruiz*, *supra*, slip op. 5-9. Congress also has the power to terminate the government's role as guardian, and the special rights afforded an Indian tribe, but it will not be presumed to have done so in the absence of clear and unequivocal legislation. *Menomines Tribe* v. *United States*, 391 U.S. 404; *Mattz* v. *Arnett*, 412 U.S. 481.

The guardianship principle and the unique history of federal relations with the Indian tribes, recognized by the Constitution and continuing to the present day, permits special arrangements that might not be appropriate with respect to other groups. The legislation challenged here, no less than a tax immunity, see *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, or a welfare benefit, *Morton* v. *Ruiz*, *supra*, or a law governing the devolution of trust property, *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, affirming 244 F. Supp. 808 E.D. Wash., is a proper exercise of the guardianship function. The preference for Indians in the Indian service helps fulfill two important governmental objectives in the exercise of this guardianship role: enhancement of Indian control over their own land and affairs, and the provision of employment and training for qualified Indians.

The underlying objectives of Congress, in the exercise of its fiduciary powers, have varied over the years. See, generally, Comment, *The Indian Battle for Self Determination*, 58 Calif. L. Rev. 445 (1970). But a principal goal has been aiding Indian tribes to govern themselves, maintain their culture and, more recently, to achieve control over the governmental programs that affect them. These themes of self-government, which have been upheld and emphasized by this Court over the years,[**] were, as we have shown, central in the passage of the Indian pref-

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[**] See *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16; *Williams* v. *Lee*, 358 U.S. 217, 220; *McClanahan* v. *Arizona State Tax Commission*, *supra*.

erence provisions of the Indian Reorganization Act. They remain important today. For example, the President's 1970 Message to Congress (6 Weekly Compilation of Presidential Documents, 894, 896 (1970)) stated that the goal of national policy toward Indians must be:

> [T]o strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.

This is in accord with the as yet not wholly fulfilled promises of 1934 of government help without government domination. The enactment of statutes directing that tribal Indians be given preference for employment in the Bureau of Indian Affairs, the federal agency which most directly and significantly affects their everyday lives, is an appropriate means chosen by Congress to advance that end.

A second purpose of the preference laws is to combat Indian unemployment and foster Indian educational opportunities. As we have shown (*supra*, pp. 21-22), the 1934 Act reversed the trend of lessened Indian participation in the Indian service, and its policy of fostering tribal Indian employment has been paralleled by the provisions of Section 701(b) and 703(i) of the 1964 Civil Rights Act (*supra*, p. 24) permitting preferences for Indians in employment by tribes and employment by private industry on or near reservations.

There is, in sum, ample constitutional basis for the long-standing federal statutory policy of granting preference to tribal Indians in employment in the Indian Service.

CONCLUSION

For the foregoing reasons the judgment of the district court should be reversed.

Respectfully submitted.

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